BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The record is barren of any evidence to connect the petitioner as co-conspirator with the other petitioners herein in the alleged conspiracy, and the Court should have directed a verdict in his favor.

There is a complete failure as to petitioner of any direct evidence to connect him with any conspiracy as alleged in the indictment. Nowhere in the record from the testimony of any of the witnesses, including Bioff and Browne, is there any proof whatsoever that petitioner participated at any time or in any way in the meetings alleged to have been held in 1934 in Riverside, at which time and place, the Government contends the alleged conspiracy was born. Nor is there any direct evidence anywhere in the record to indicate that petitioner had any knowledge of such meetings or of the alleged scheme or schemes that were devised thereat. The record is entirely barren of any testimony which would indicate that petitioner committed any acts with knowledge of furthering the purposes of the alleged conspiracy. Nor is there a scintilla of direct evidence in the record to indicate that petitioner subsequently acquired knowledge of the formation and existence of the said conspiracy and was cognizant of its purposes.

Certainly the presence of the Petitioner at the convention in and of itself did not constitute proper evidence so as to establish him a member of the conspiracy as alleged in the indictment and did not establish a factual basis from which the Jury should be permitted to infer therefrom and speculate thereon to reach a conclusion that

such presence was for the purpose of knowingly furthering the aims of said conspiracy.

There is no evidence whatsoever in the record to support the Government's contention as stated to the Jury that the function of Petitioner's presence at said convention was as a "muscle-man" to intimidate delegates for the purpose of insuring Browne's election. Nowhere does it appear in the record that Petitioner did anything, or committed any act at said convention which would form a factual basis for said contention from which such an inference could legally be drawn. Thus an inference upon an inference was permitted and indulged in at the trial, *e.g.*, from the mere fact that Petitioner was present at the convention it was to be inferred that he was there as a member of the conspiracy with full knowledge of its existence and purposes in the role of a "muscle-man" to intimidate all delegates so that their votes would be cast for Browne. From this inference another was permitted to be drawn therefrom and to speculate thereon that such delegates were intimidated by Petitioner's presence and by reason thereof brought about the election of Browne.

There were many others at this convention as the testimony shows,—Romano, Joe Batters, Charlie Imburgio and Bob McCullough,—who were not accredited delegates to the convention. Nevertheless no one other than Petitioner was indicted as being a member of the alleged conspiracy for the obvious reason that the Government realized, and properly so, that the mere presence at the convention was not sufficient evidence so as to form a factual basis which would properly permit an inference to be drawn therefrom to the effect that such presence was motivated by an agreement with knowledge and intent thereof to commit the acts set forth in the indictment.

Pierce's inclusion in the indictment was prompted by the fact that he drove Browne in an automobile to meet Frank Rio at the instruction of Gioe and was present at the conversation which occurred between Barger and Rio

(R. 1032-33). The motion to dismiss against Pierce was properly granted on the ground that there was no evidence introduced by the Government to show that Pierce had any knowledge of any alleged agreement to extort, as set forth in the indictment and that mere association with the co-conspirators was not sufficient to warrant submission of his case to the Jury. Petitioner's position was no different from that of Pierce and the motion to dismiss should similarly have been granted as to Petitioner.

That one may subsequently enter into or adhere to an existing conspiracy is well settled but it is incumbent upon the Government to prove beyond a reasonable doubt by producing proper and forceful evidence that the individual agreed to enter into a conspiracy with knowledge of its illegal purpose or committed such overt acts encompassed by the conspiracy from which such knowledge could properly be inferred. No such evidence in connection with Petitioner's presence at the convention is present in the record herein. In attempting to establish an overt act committed by Petitioner at the convention from which fact it could then reasonably be inferred that the purpose of Petitioner's presence was to insure the votes of the delegates for Browne, the Government attempted to produce a Dr. Papp who was not an accredited delegate to the convention and attended thereat voluntarily and was a friend of Bioff. The Government attempted to obtain from Dr. Papp testimony that he was handled roughly by a group, of which Petitioner was one. The ludicrous and picayune character of this testimony upon which the Prosecutor attempted to place such great weight for the purpose of establishing a factual basis from which an inference could be drawn for the purpose of establishing that Petitioner was acting pursuant to an agreement as a co-conspirator under this indictment is a clear indication of the desperate condition that the Government found itself in in its case against Petitioner.

Barger's testimony shows that he paid the petitioner sums of money commencing December, 1935 or January, 1936, and extending to September 8, 1937, when the last payment was made. It is this testimony upon which the Government relied more heavily in its attempt to link petitioner as a co-conspirator and was the basis for the Court's statement in the opinion below, "We start therefore with the hypothesis that all of the accused now at bar were parties to a blackmailing conspiracy of wide scope, long duration and vast returns." This conclusion is based not on evidence, but on speculation and suspicion.

It was still incumbent upon the Government who had the burden of proof in a criminal cause to establish beyond a reasonable doubt that such payments from Barger were received by petitioner as a co-conspirator and that such moneys were received by petitioner in accordance with and pursuant to the conspiracy set forth in the indictment. This evidence was not sufficient to warrant the submission of petitioner's case to the jury for speculation. Suspicion does not take the place of evidence and is not a substitute therefor. The utter failure of the Government to establish by competent proof that petitioner received this money as a result of the unlawful agreement charged in the indictment, with full knowledge thereof and in furtherance of its aims and purpose, was fatal.

In *Weniger* v. *United States* (C. C. A. 9), 47 Fed. (2nd) 692, 693, the Court said:

> "Neither will the commission of an avert act, although unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

To the same effect is *Dahly* v. *United States,* 50 Fed. (2nd) 37, 43:

> "Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of the conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein with knowledge of the agreement."

The cases hold with unanimity that one cannot be held to be a party to a conspiracy unless it be shown by competent and convincing proof that he had knowledge of the conspiracy and intentionally committed some act in furtherance thereof. (*United States* v. *Crimmins* (C. C. A. 2nd) 123 Fed. 2nd, 271; *Kassin* v. *United States,* 87 Fed. 2nd 183; *United States* v. *Falcone,* 311 U. S. 205. See also *Gerson* v. *United States,* 25 Fed. 2nd 49.)

It is equally well settled that hearsay testimony cannot be used to connect an alleged conspirator with a conspiracy by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence. Declarations of one conspirator to another are not competent evidence to establish the connection of a third person with such conspiracy. (*Glasser* v. *United States,* 315 U. S. 60; *Kuhn* v. *United States,* C. C. A. 9, 26 Fed. (2nd) 463.) Proof of mere association is not sufficient; the evidence must establish the existence of the conspiracy charged, the knowledge thereof by the defendant and intentional participation therein. By reason of the foregoing, the Court should have directed a verdict for petitioner.

POINT II

The dealings between petitioner and Barger were purely of a local nature.

Proof that Barger was engaged in interstate commerce was a jurisdictional requisite for the prosecution of this cause. It is the heart of the indictment and the extraction or removal therefrom of this element renders the whole charge untenable. Barger leased or purchased his pictures from a distributor located in Chicago and merely exhibited such pictures. The exhibition of such films leased or purchased from the distributors did not bring Barger within the ambit of interstate commerce. These payments were purely of a local nature and collateral to the issues involved in this case. The Court below in its opinion stated that the business was interstate as a matter of law and the question should not have been submitted to the jury; and since nobody contested the facts, but only its legal effect it was unnecessary for the Judge to say anything on the issue. It is respectfully urged that there was a serious question as to whether or not Barger was engaged in interstate commerce and that such question was one for the jury for its determination and that the denial of petitioner's motion for such submission was error.

This fact must be proven like any other fact in a criminal case and since Barger was the one whose testimony precipitated petitioner in this cause his status with respect to interstate commerce was particularly important to petitioner. Since it goes to the jurisdiction of the Court in this cause it necessarily follows that unless it is proven beyond a reasonable doubt the conviction of the petitioner must fail. The films that Barger had purchased or leased had come to rest and their movement had certainly ended with their delivery to Barger's theatre, the

Rialto. These films may be exhibited for a run for weeks or for such period as the exhibitors may choose to display them. The fact that these films might afterwards be reshipped through various States does not cloak them with perpetual motion. Their movement comes to rest at some point and certainly at the point of exhibition by the local theatre. (*Schechter Poultry Co.* v. *United States*, 295 U. S. 495, 55 S. Ct. 838; *A. C. L. R. R. Co.* v. *Standard Oil Co.*, 12 Fed. 2nd, 540; *Fox Film Company* v. *Trumbull*, 7 Fed. 2nd, 715.)

The trial Court however, resolved the issue as a matter of law holding that in view of the fact that the moving picture industry was engaged in interstate commerce, any extortion from any part of the industry came within the purview of the entire racketeering act. It is respectfully submitted that films during their exhibition are not *moving or about to move* in interstate commerce. The foreclosure by the Court of this question in its refusal to grant the requested charge that it was the burden of the Government to prove beyond a reasonable doubt that Barger was engaged in interstate commerce was error which at least entitles petitioner to a new trial. (*McAdams* v. *United States*, 74 Fed. 2nd, 37. See also, *Penn. R. R.* v. *Donat*, 239 U. S. 50; *Apex Hosiery Co.* v. *Leader*, 310 U. S., 469.)

POINT III

The indictment and prosecution of petitioner was barred by the Statute of Limitations as a matter of law.

If we were to assume that petitioner was a member of a continuing conspiracy, then it is respectfully submitted that the statute had tolled and barred a prosecution therefor. The record discloses, as hereinbefore stated that petitioner's last act in this picture was the receipt of moneys from Barger on September 8, 1937. No further mention is made of petitioner as having done or committed any act thereafter to the time of the indictment six years later.

No proof was offered by the Government to establish that petitioner participated in any of the acts committed after 1937 or had any knowledge whatsoever or approved any acts in the furtherance of the alleged continuing conspiracy. The rule appears well established that if one is a member of a conspiracy which is a continuing one, in order to effectuate a withdrawal so as to cause a tolling of the statute, he must manifest such withdrawal by some affirmative act to avoid being dragged along by subsequent deeds of his co-conspirators in furtherance thereof. (*Hyde* v. *United States*, 225 U. S. 347.)

However, it is respectfully submitted to this Court that the inactivity of petitioner after 1937 for a period of six years spelled out an abandonment to such a degree and nature as to constitute an affirmative withdrawal as a matter of law,—particularly when coupled with Barger's testimony that petitioner informed him that he refused to collect any further moneys.

The courts have not laid down any specific rule as to what would be a sufficient act of withdrawal or what would constitute competent or sufficient evidence to establish such withdrawal.

In *Buhler* v. *United States*, 33 Fed. 2d 382, the Court said that it can be shown by conduct "wholly inconsistent with the theory of a continuing adherence". (See also, *Eldredge* v. *United States*, 62 Fed (2nd) 449.)

Furthermore, since the Government's evidence with respect to petitioner was purely circumstantial, we may well adopt the language of the Court in the *Buhler* case (p. 384):

> "The Government does not contend that appellant devised or participated in devising the scheme in question or in its inception had anything to do with or knew anything about it."

And, further,

> "The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial in practice often taking wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character."

Accordingly, it is respectfully submitted that it was the duty of the Court to hold as a matter of law that petitioner had effectively withdrawn from any part in the conspiracy "assuming that he was a member thereof" and that his prosecution therefore was barred by the statute of limitations.

POINT IV

The conviction of petitioner, brought about by the tactics and methods employed by the Government, is offensive to the fundamental conceptions of due process of law.

Testimony was introduced by the Government and erroneously admitted by the Court for no other purpose than to inflame the minds of the jury with respect to petitioner. Due process embodies fundamental principles of fairness; to a right to be tried by the fair and dispassionate presentation of the evidence. The whole record is permeated with instances of prejudicial error committed by the Government with respect to petitioner in the attempt to inflame the minds of the jurors so that they may disregard the evidence and to judge petitioner dispassionately and fairly upon such evidence.

In spite of the fact that the record is barren of any misconduct on the part of petitioner when he was present in Louisville at the time of the 1934 convention, we find this statement by the prosecutor (R. 3639):

> "And in addition certain members of this mob were delegated to the convention to make sure that everything goes right, and that is where our friend Frank Diamond makes his first appearance."

There is not a scintilla of evidence in the record that petitioner was delegated by anyone or did anything at the convention that could prove that he committed one act in the conspiracy charged or in furtherance thereof. And again we find the following (R. 3641):

> "Regarding this unanimous vote in 1934 and the fact that there was no opposition, suppose you were a delegate to that convention and you saw the hall policed by Circella, by Bioff, by Frank Diamond, by

> Lepke Buchalter, whose job it was to get Browne elected, would that have any effect upon your independent judgment, particularly when there was no one running against Browne."

We find no evidence in the record that anybody else was nominated to run for office in opposition to Browne or that your petitioner improperly influenced any delegate present at said convention or committed any act which would even tend to indicate or from which an inference as stated by this Prosecutor could be drawn.

The numerous errors in the admission of testimony, even with the latitude permitted in conspiracy cases are so glaring and their purpose was so obvious as to result in a flagrant denial of due process. The Prosecutor was permitted to elicit the wholly immaterial testimony through Barger (R. 2127-2128) to the effect that Barger (characterized in the opinion of the Court below as "this unfortunate man") paid a social call at the home of Ralph Capone on an occasion when Capone's mother-in-law was ill and there he saw petitioner and his wife in the premises at the time. And in answer to the question whether he had any words with your petitioner concerning any of his business, Barger answered in the negative. Upon this testimony was based the Prosecutor's summation to the following effect:

> "If Barger had any questions as to who Diamond was, these questions were easily resolved when he saw Diamond at Ralph Capone's house. That is in the testimony."

Not only did the Court refuse to strike this testimony but permitted the Prosecutor to comment upon it in his summation.

The record is replete with such irrelevant and inflammatory testimony for the purpose of creating an atmosphere of prejudice and passion. The Government was in

effect telling the jury with the sanction of the Court that this defendant was associated with notorious characters and even if the evidence was sufficient to convict petitioner, he was a disreputable character because of his associations and by reason thereof should be convicted. Nevertheless our laws do not as yet permit convictions on its citizens merely by reason of their associations or their reputation. In the atmosphere so created, one need not indulge in too much speculation to appreciate what happened to the fundamental concept of our laws that in a criminal cause, one is presumed to be innocent until proven guilty beyond a reasonable doubt by clear, convincing evidence and only on such evidence.

In *Beck* v. *U. S.*, 33 Fed. 2nd, 107, 114, the Court stated:

> "A trial in the United States Court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them can not be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record of conviction."

Conclusion

This case presents important constitutional issues involving due process of law. It is respectfully urged that the record in this cause consists of a mass of errors which errors singly and collectively deprived petitioner of a fair trial and that his conviction resulting therefrom was a flagrant denial of due process of law. As was stated by Judge Swinford in *United States* v. *Moore*, 40 Fed. Sup. 543:

"There has grown up in this country a practice amongst United States attorneys to use 18 U. S. C. A. No. 88, the so called conspiracy statute, as a catch all or dragnet for everything and everybody, wheresoever found who might have had some remote connection with the substance of crime or crimes charged. This important and useful criminal statute has been prostituted beyond recognition. There is an attempt to ensnare not only those enacting the crime but any who might be standing in its shadow. * * * It should not be permitted to flourish."

Respectfully submitted,

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